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No. 661

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

EDGAR I. SHOTT, JR.,

Petitioner,

vs.

THOMAS A. CONROY, Trustee in Bankruptcy for Leslie D. Stickler, Bankrupt,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

J. VINCENT AUG
S. ARTHUR SPIEGEL
Atlas Bank Building
Cincinnati, Ohio 45202
Counsel for Respondent.

Of Counsel:
WILLIAM H. NIEMAN
1005 Atlas Bank Bldg.
Cincinnati, Ohio 45202

JAMES G. ANDREWS, JR.
205 Atlas Bank Building
Cincinnati, Ohio 45202
Counsel for Petitioner

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

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QUESTIONS PRESENTED

I. Did the United States District Court properly direct a verdict for plaintiff appellee (a) where the liability of defendant appellant had been previously determined, (b) where plaintiff appellee introduced uncontroverted evidence of 600 or more transactions in fraud of creditors between defendant appellant and the bankrupt representing a cumulative total of $1,354,910.00 and (c) where defendant appellant failed to offer any evidence as to "loans, credits or repayments" to which he may have been entitled?

The United States District Court and the United States Court of Appeals for the Sixth Circuit answered this question, "Yes". Plaintiff appellee contends these answers were correct.

II. Was it proper for the United States District Court to base its directed verdict on the cumulative total of 600 or more transactions amounting to $1,354,910.00 where defendant appellant offered no evidence as to credits or payments, if any, to which he may have been entitled and where defendant appellant raises the conjectural proposition that such a judgment intentionally creates a "monumental surplus in the bankrupt estate."

> The United States District Court and the United States Court of Appeals for the Sixth Circuit answered this question, "Yes". Plaintiff appellee contends these answers were correct.

STATEMENT OF THE CASE

This is an appeal by defendant appellant, Edgar I. Shott, Jr., from a judgment rendered on a directed verdict in the amount of $1,354,910.00. The Court of Appeals for the Sixth Circuit had previously[1] vacated the judgment of the District Court which had granted summary judgment against the appellant in the amount of $1,363,410.00 and remanded the case for redetermination of the amount of the judgment for the reason that:

> "The record discloses 600 or more transactions between the defendant and Bankrupt which, presumably, involved many loans, credits and repayments. The record does not demonstrate to our satisfaction that the cumulative total of $1,363,410.00 is the correct basis for judgment." (App. 8b #17966)

and, consequently, there was a genuine issue as to material fact with respect to the amount of judgment to which the Trustee was entitled against Mr. Shott.

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[1] 363 F. 2d 90.

Following the announcement of this Court's decision, a conference between counsel and the Honorable John W. Peck, who had previously granted the summary judgment in the amount of $1,363,410.00, was held on January 4, 1967, at which a record[2] was made to determine the method of proceeding in accordance with the mandate of this Court. Thereafter, a jury trial was held before the Honorable Carl W. Weinman, Chief Judge of the Federal District Court for the Southern District of Ohio, Western Division, at Dayton, Ohio, on April 4 and 5. At the beginning of the trial (R 14, App. 41b #17966) Judge Weinman ordered that the following material would be made part of the record of the proceeding before the Court because of the unusual nature of the case:[3]

(a) Record of the pre-trial conference of September 30, 1964, between counsel and the Honorable John W. Peck, District Judge (App. 11b #16489).

(b) Memorandum, Opinion and Order of the Honorable John W. Peck filed January 26, 1965 (App. 30a #16489).

(c) Opinion of the United States Court of Appeals for the Sixth Circuit in Appeal No. 16489, Conroy, Trustee vs. Shott, decided July 8, 1966 (App. 1b #17966).

(d) Transcript of the conference between counsel and the Honorable John W. Peck on January 4, 1967 (App. 9b #17966).

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[2] The transcript of said conference of January 4, 1967, is set forth in App. 9b et seq. #17966.

[3] By order of this Court on September 13, 1967, Plaintiff-Appellee was allowed to incorporate by reference the Briefs and appendices in the previous appeal #16489. References to appendices will distinguish between the two appeals by setting forth the appropriate case numbers.

Plaintiff appellee in the second trial presented testimony and exhibits supporting the fact that Mr. Shott received from the Bankrupt for the period from September 17, 1957, to January 4, 1961, $1,363,410.00. Defendant appellant neither cross examined plaintiff appellee's witnesses (R 21, App. 18a and R 64, App. 61b #17966), nor offered any evidence or exhibits concerning "loans," "credits," and/or "repayments." The proffer (R 66, App. 39a #17966) made by defendant-appellant did not involve loans, credits and/or repayments, but was concerned with the activity of the Trustee in Bankruptcy in realizing an estate for the creditors of the Bankrupt Stickler, as well as the amount of proofs of claim on file in the bankruptcy.

Judge Weinman, consequently, had no alternative but to direct a verdict for the plaintiff in the amount of $1,354,910.00 (R 74, App. 42a #17966), being the amount of payments as represented by canceled checks from the Bankrupt Stickler to "Edgar I. Shott, Jr.," "Edgar I. Shott, Jr., Attorney," and "Shott Investment Company" introduced in evidence by the plaintiff through Thomas A. Conroy, Trustee in Bankruptcy, as well as John E. Shriver, certified public accountant, expert witness retained by the Trustee pursuant to order of the referee in bankruptcy and who reconstructed and analyzed the Bankrupt's financial dealings with the defendant (R 51, App. 34a and R 59, App. 37a #17966). The defendant did not appear at the trial (R 16, App. 42b and R 68, App. 61b #17966), although plaintiff had issued a subpoena for his appearance as well as the production of his records, and had called for his testimony as on cross examination.

On March 29, 1967, several days before the scheduled jury trial before Judge Weinman, the defendant filed his Answer to the Amended Complaint (App. 10a #17966). On March 30 plaintiff filed his Motion to Strike from the

Answer to the Amended Complaint (App. 37b #17966). The significance of these facts will be noted later in the Brief.

The Amended Complaint (8b #16489) of plaintiff appellee asserts that at the "commencement of the bankruptcy proceedings Stickler was indebted to creditors in an amount in excess of $2,000,000.00 and that this defendant was listed as one of said creditors, and that the said Stickler had less than $2,000.00 in cash on hand at the commencement of said bankruptcy proceedings".

The bankruptcy proceedings giving rise to this action have not been concluded. No claims have been allowed or rejected as yet, nor have any fees or expenses in the administration of the bankrupt's estate been determined. There have been a number of actions filed by the Trustee in the United States District Court against others who are in a similar position to that of defendant appellant and a number of settlements have been negotiated.

In excess of $1,600,000.00 in claims have not yet been presented in the bankruptcy proceedings, which under the authority of Section 57 n of the National Bankruptcy Act may be filed hereafter.

REASONS FOR DENYING THE WRIT

I. Did the United States District Court properly direct a verdict for plaintiff appellee (a) where the liability of defendant appellant had been previously determined, (b) where plaintiff appellee introduced uncontroverted evidence of 600 or more transactions in fraud of creditors between defendant appellant and the bankrupt representing a cumulative total of $1,354,910.00 and (c) where defendant appellant failed to offer any evidence as to "loans, credits or repayments" to which he may have been entitled?

Defendant appellant is attempting to assert a conflict between the Fifth and Tenth and Sixth Circuits with respect to the law requiring proof of a creditor in existence at the time of the challenged transactions under Section 70 e of the National Bankruptcy Act. This distorts the position of the District Court and Appeals Court in this matter and is completely erroneous. The District Court and the Court of Appeals in finding in favor of plaintiff appellee on the issue of liability have found that the required creditors did exist.

The argument made by defendant appellant here has been made before in this case in various forms. It was raised in the first appeal to the Court of Appeals where defendant appellant challenged plaintiff appellee's right to a summary judgment. See appellant's Brief pp. 6 #16489 and appellee's Answer Brief pp. 5 #16489. The Court of Appeals affirmed the position of the District Court on the question of liability and vacated the judgment only for the purpose of redetermining the amount of the judgment. The Supreme Court in refusing to grant certiorari from that decision once and for all removed that question from consideration in this case, yet defendant appellant still insists on raising the issue.

To illustrate that the question of whether "at the time of each such transfer, there was in existence a creditor of the bankrupt having a claim provable against the bankrupt in the bankruptcy proceedings" has been disposed of in the original proceedings, note the memorandum opinion and order of Judge John W. Peck, the District Court Judge, where Judge Peck found that:

> "Stickler's scheme was the essence of simplicity, not to say of stupidity. At its inception he borrowed from A, then borrowed from B to repay A. The inducement to B was a high rate of interest on a short term, whereupon it became necessary to borrow from C

> to repay B. This operation continued, with ever increasing rates of interest and shortening of the loan periods, until hundreds of transactions involving millions of dollars had been entered into by Stickler. However, since he was insolvent from the moment of the making of the first loan, and since there has never been a suggestion that any source of income existed except new loans (if such may be considered a 'source of income'). * * *." (App. 32a #16489)

How can there be insolvency without creditors? Also, note other relevant finding of Judge Peck:

> "Since some reference has been made to other lenders of money to Stickler, whose relationships to the plaintiff would vary from this defendant's only to the extent that their loans had been repaid, mention should be made of the fact that Stickler had other creditors whose claims arose out of completely different classes of obligations, as for example, the purchase by Stickler of items of personal property." (App. 35a #16489)

The Court of Appeals adopted Judge Peck's opinion on the question of liability (363 F 2 90), the Supreme Court refused certiorari (#586 Oct. Term 1966) on this question on the first appeal from the Sixth Circuit. Thus the question which defendant appellant is raising here has already been disposed of in the earlier proceedings.

For further illustration with respect to this matter, an analysis of the defendant's Brief in the previous appeal indicates that there were four basis upon which he was seeking a reversal. Three concerned themselves with the question of liability and the fourth with the amount of the judgment. Upon the question of liability, he raised the problems of not only the proof of the actual existence of a creditor, but also proof of fraudulent intent and knowledge of fraudulent intent. These all go to the question of liability.

It is interesting to note that both in the pre-trial conference of September 30, 1964 (App. 11b #16489), as well as in the conference held following the decision in #16489 on January 4, 1967 (App. 9b #17966), defendant-appellant's counsel did not raise the question of the proof of the actual existence of a creditor having a provable claim as a contested issue of fact in these proceedings. Actually, in the first conference counsel for defendant-appellant conceded that this was not an issue:

> "THE COURT: I am talking about the creditors of the Bankrupt estate. Isn't that plain? Of course I think you can satisfy what is in my mind. If we are only talking about creditors similarly situate, then we start in the realm of equity.
>
> "I think, based on some of the statements in the plaintiff's pre-trial statement, they do everything but talk about balancing equities. They talk about unjust enrichment and quite a number of things in that area. If it were a fact that we are only talking about people that were involved in this get rich-quick scheme, I was wondering whether there was any defense available on that ground. But if there are any or even any, much less substantial, creditors who did not participate in this, I don't think we have to discuss that at all. Incidentally, defendant does not raise that point anyway.
>
> "MR. ANDREWS: (Shaking head)." (App. 14b #16489)

No doubt the foregoing language is one of the bases upon which Judge Peck concluded:

> ". . . that Stickler had other creditors whose claims arose out of completely different classes of obligations, as for example, the purchase by Stickler of items of personal property." (App. 36a #16489)

At the conference of January 4, 1967 between all counsel and Judge Peck, the only factual issue raised by defen-

dant-appellant's counsel which could be resolved by a jury, aside from the question of the number and amount of payments (App. 32b #17966), was whether at the time the defendant-appellant received each payment from the Bankrupt he had the requisite knowledge of the Bankrupt's fraudulent intent (App. 14b #17966). But no question is being raised on the "knowledge" question in this appeal; and there was no cross examination or opposing evidence introduced by defendant-appellant to counter appellee's evidence as to number and amount of payments to Shott. At no point in the conference did the defendant-appellant's counsel intimate that there was any question concerning proof of the actual existence of a creditor.

Note also that the Answer of defendant-appellant filed on March 29, 1967, which in paragraph 8 of the Second Defense states:

> "Defendant admits that the Bankrupt, Stickler, inaugurated a scheme several years prior to his bankruptcy whereby he borrowed from numerous individuals substantial sums of money upon which he promised to pay exhorbitant interests far in excess of the legal rate as established by the Ohio Revised Code; that at all times from the inauguration of such scheme until the judication in bankruptcy, said Stickler was insolvent. * * *"

is an admission that there were creditors because it is obvious there can be no insolvency unless there are creditors.

The purpose of reviewing the pre-trial conference of September 30, 1964, the conference of counsel and the Court January 4, 1967, the findings of fact contained in the Memorandum, Opinion and Order of Judge Peck filed on January 26, 1965, which was substantially incorporated by reference and set out in the decision of the Court in the former appeal in case No. 16489, and

made a part of the record in the second trial before Judge Weinman, is to show factually that there was no contested issue of fact concerning "the actual existence of a creditor having a provable claim" and that such claim is without merit.

Can there be any doubt about the existence of a creditor, where the Amended Complaint alleges the fraudulent scheme and Stickler's insolvency from the beginning, the Answer admits such fact, the District Court found such facts to exist, and the finding was included in the Court of Appeals Opinion in No. 16489. Since Stickler was insolvent from the beginning, there was no time thereafter when there were no creditors being defrauded by his payments to Shott. Moreover, under applicable Ohio laws a subsequent creditor, such as those referred to in defendant-appellant's Answer at App. 11a #17966, may also avoid fraudulent transfers, where actual intent to defraud is shown — as it has been found to exist in this case: *Webb* v. *Roff*, 9 O.S. 430 (1859); *Evans* v. *Lewis*, 30 O. S. 11 (1877); *Edwards* v. *Monning*, 127 O. S. 268, 28 N. E. 2d 627 (1940); 25 Ohio Jurisprudence 2d 525, Fraudulent Conveyances, Paragraph 100.

II. Was it proper for the United States District Court to base its directed verdict on the cumulative total of 600 or more transactions amounting to $1,354,910.00 where defendant appellant offered no evidence as to credits or payments, if any, to which he may have been entitled and where defendant appellant raises the conjectural proposition that such a judgment intentionally creates a "monumental surplus in the bankrupt estate."

Defendant appellant has consistently throughout these proceedings presented himself as a phrase maker, the most recent of which uses the words "intentional creation of

a monumental surplus in the bankrupt estate". No justification for the use of this phrase exists and no factual situation is present to warrant its use. Defendant appellant is correct when he states approximately $400,000 in claims have been filed on the bankrupt estate. No basis exists for his conclusion that a substantial portion of the claims will be disallowed. As to claims filed by the creditors who had dealings with the bankrupt, defendant appellant would summarily dispose of their claims with a broad sweep of the applicability of the rule of *Pepper* v. *Litton* 308 U.S. 295. All without a hearing we presume on the basic merits of each claim.

It is interesting to note that the National Bankruptcy Act does not prevent those who have participated in fraudulent transfers and preferences from having claims allowed on an "equitable" theory. Rather, the Act specifically provides in Section 57 n for the filing of claims by persons who have had transactions avoided. Thus, the assumption that the Referee will disallow claims in such significant amounts as to create a monumental surplus is not warranted by the law or the facts of this case. The posture of the bankrupt proceedings in this case at the present time is such that the assets realized to date are insignificant in proportion to the obligations of the bankrupt estate. Any representation by the defendant appellant to the contrary is a last ditch effort on his part to mislead this Court.

The Court, the defendant appellant and the plaintiff appellee all know that a judgment is one thing, its collection another. What the ultimate status of the bankruptcy estate will be is still far from being determined and defendant appellant by raising the question of a surplus at this time is raising a question which the legislature has decreed should be handled by the Bankruptcy Court. The

provisions of Section 57 n provide for the handling of a surplus if any should ever arise.

> "When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the Court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case." Sec. 57 N National Bankruptcy Act (11 USC 93).

Defendant appellant in a totally unwarranted and unsubstantiated comment at the end of his brief states that "when this needlessly created pie is finally cut up, the results will shock this Court and the public conscience as well."

We do not presume to understand the full impact of this comment, nor where the Courts and the Referee in Bankruptcy would be while this was going on, but if the inference is that counsel and trustee are improperly performing the obligations of their offices, the comment is wholly unsubstantiated, unethical and calls for an apology on the part of counsel for Petitioner.

It should be observed that neither the Trustee nor his counsel in the Stickler bankruptcy have received any compensation from the commencement of the bankruptcy proceedings to the date of the preparation of this Brief. Judge Peck in his Memorandum, Opinion and Order recognized that the Trustee and his counsel were attempting to carry out their assigned responsibility under the Bankruptcy Act when he observed:

> "In prosecuting this action, as in pursuing other assets of the Bankrupt including claims against other creditors in defendant's category, the plaintiff Trustee is carrying out his assigned responsibility of creating a fund in which properly proven claimants may participate." (App. 36a #16489)

Actually, the slurring comment of counsel for defendant appellant obliquely raises the question that was before Judge Weinman in handling this Court's mandate. On March 29, 1967, defendant appellant filed his Answer to the Amended Complaint (App. 10a #17966), and on the following day plaintiff appellee moved to strike certain language from said Answer. The issues raised by the Motion to Strike (App. 37b #17966), went to the heart of the proceedings on the remand from this Court.

For instance, the First Defense in the Answer asserted that the complaint failed to state a claim upon which relief could be granted. The Motion to Strike this Defense was based upon the decision in the former appeal affirming on the question of liability. Moreover, the Second Defense denied plaintiff appellee's capacity to sue, and asserted that plaintiff appellee had on hand assets in the Bankrupt estate in excess of the provable and allowable claims then on file in the bankruptcy, as well as alleging that all participants in the fraudulent scheme, which defendant appellant admitted existed, be treated alike. The Motion to Strike that portion of the Answer concerning the amount of the assets on hand in the Bankrupt's estate, the proofs of claim on file, as well as the material contained in the Fourth Defense of the Answer which concerned itself with other action by plaintiff appellee, was grounded on the premise that such material was not relevant to the number and amount of fraudulent transfers received by the defendant appellant from the Bankrupt. This Court had previously upheld plaintiff appellee's capacity and authority to sue.

Judge Weinman recognized that such defenses were irrelevant to the problem presented to him by the pleadings and past proceedings in this case when he stated:

> "I don't think that these defenses that you have here apply in this case, but I will allow you to protect your recrod [sic] in that respect." (App. 38a #17966)

The hearing before Judge Weinman, therefore, was confined to the issue stipulated by this Court in the previous appeal to wit: Whether defendant appellant was entitled to any allowances by reason of any "loans," "credits" and/or "repayments" in the "600 or more transactions between the defendant and the Bankrupt"; and in support of the issues, plaintiff appellee produced testimony and exhibits to establish the maximum he was entitled to recover, but defendant appellant neither cross examined nor offered any testimony to support his right to a reduction by reason of "loans," "credits" and "repayments."

In support of the correctness of the District Court's position that matters referring to the amount of provable claims on file, the amount that the Trustee had realized in the Bankruptcy estate account, the number and status of pending suits against other participants in the investment scheme, etc., were not relevant to the issue of the right of the plaintiff appellee to recover from the defendant appellant, are the provisions of Section 70e (2) of the Federal Bankruptcy Act, which refers to fraudulent transfers:

> "The property of the debtor affected by any such transfer shall be and remain a part of the assets and estate, discharged and released from such transfer and shall pass to, and every such transfer and obligation *shall be avoided by the trustee* for the benefit of the estate. * * *" (emphasis ours)

Here, the Trustee is specifically commanded to avoid fraudulent transfers. Nowhere in the Bankruptcy Act is there any provision limiting the obligation of the Trustee in avoiding such transfers, to the value of the proofs of claim filed in the proceedings. In fact, as pointed out above the Bankruptcy Act recognizes the real possibility that the Trustee may realize assets in excess of the value

of the proofs of claim and, specifically, provides for the method for distribution of such surplus under Section 57 n. As set forth in Volume 4, *Collier on Bankruptcy,* 14th Ed. in paragraph 70.94 at page 1775:

> "Thus, although there are some early cases to the contrary, the prevailing rule is that the trustee need not, under Section 70 e, allege or prove the filing or allowance of claims in the bankruptcy proceedings. Requirement of such a showing can be implied neither from the Bankruptcy Act, nor from the Non-Bankruptcy Law that may be invoked by the trustee in actions brought under the subdivision, and application of such a requirement might seriously embarrass the efforts of a receiver or trustee to recover fraudulently transferred property before it could be dissipated. Furthermore, under the present provisions of Section 57 n regarding the filing of late claims, the fact that at the time of suit there were no claims either filed or allowed against the estate, even where the original six months period had expired, would not foreclose the possibility that claims might be presented and allowed thereafter under certain circumstances."

Furthermore, at page 1796, the textwriter points out: "Whether there are any other creditors who will share in the distribution of the estate is no concern of the trial court in a suit under Section 70e is but an extention of this view that where the trustee asserts a good cause of action based on Section 70 e the fact that there may be a surplus in the estate over and above the claims of creditors is not a valid basis for limiting the amount of the recovery in the trial court." As pointed out in *Davis* v. *Gates,* (D. C. Pa.), 37 Am. B. R. 818, 235 Fed. 192. The Court stated in analyzing Sections 70 a and e of the Bankruptcy Act:

> "Power is thus conferred upon a trustee to recover all the property transferred in fraud of creditors, al-

> though such recovery may result in the possession by the trustee of property in excess of the entire indebtedness of the bankrupt. It is manifestly impracticable in all cases to determine in advance the exact amount or proportion of the property fraudulently transferred, or its value, it is necessary that it should be received by a trustee to insure the payment in full of the bankrupt's indebtedness; and further, if the result of the recovery by a trustee would be to put in his possession assets more than sufficient to insure such payment in full, any surplus would be turned over under the direction of the court to the transferee or other as justice might require."

The Supreme Court of the United States in *Moore* v. *Bay*, 284 U. S. 4, 52 S. Ct. 3, 76 L. Ed. 133, held that the extent of the Trustee's recovery in such an action is not measured by the creditor's right. As noted in *Collier's* page 1800, "Since the decision in the Bay case, no dissenting voice has been raised by the courts. The accepted rule is that in a suit under Section 70e, if the transfer or obligation is voidable at all, it is voidable *in toto*."

Thus, rather than "seeking to create a monumental surplus for the sole purpose of obtaining huge fees," as charged by defendant appellant, the Trustee "is carrying out his assigned responsibility of creating a fund in which properly proven claimants may participate," as noted by the District Court.

Defendant appellant cited *Page* v. *Rogers* 211 U.S. 575 1909, for the proposition that the United States District Court, as the Bankruptcy Court, may determine the net amount to be recovered from defendant appellant in order to avoid the "circuitous proceedings of compelling the defendant to pay into the Bankruptcy Court the full amount * * * which he has received, and then to resort to the same court to obtain part of it back by way of

dividend" (211 U.S. 581) Note, however, that in *Page* v. *Rogers,* the bankruptcy proceedings were completed, the determination of the amount necessary to be realized to pay creditors and expenses of administration having been determined. Recognizing these facts, the Court stated at page 511:

> "Now that this litigation has come to an end, and the defendant has been compelled to surrender the preference which he has received, he is entitled to prove his claim and to receive a dividend on it upon an equality with other creditors * * *. In view of the fact that this suit was brought in the Bankruptcy Court itself, and the final decree is to be entered by the Judge of that Court, it is entirely practicable to avoid the circuitous proceedings of compelling the defendant to pay into the Bankruptcy Court the full amount of the preference which he has received, and then to resort to the same Court to obtain part of it back by way of dividend. The defendant may be permitted, if he shall be so advised, to prove his claim against the estate of the bankrupt, the Bankruptcy Court then may settle the amount of the dividend coming to him and the final decree may direct him to pay over the full amount of his preference, with interest less the amount of his dividend. * * *"

Assuming *Page* v. *Rogers* to be the law today, the facts in the instant case are not analogous to those in *Page* v. *Rogers* because no determination has been made of the amount necessary to satisfy the claims of creditors or the expenses of administration, nor has final time for the filing and proof of all claims expired.

Furthermore, *Page* v. *Rogers* concerns preferential transfers, which have traditionally been given more favorable treatment under the law than fraudulent transfers, and finally, it should be noted that the case was decided under the Bankruptcy Law of 1898 as then in effect, which made

no provision for the contingency of a surplus as does the present Act.

CONCLUSION

In this Petition for Writ of Certiorari defendant appellant contends that there was an absence of proof of a fundamental requirement of our cause of action. His second contention is that a judgment which creates a surplus in a bankrupt estate is invalid. Our comments above have shown the fallacy of both contentions. It should be further noted that neither of his propositions in any sense approach the standards of Rule 19 of the Supreme Court Rules (Conditions governing review on Certiorari). The defendant appellant has had his case before the District Court twice, the Sixth Circuit Court of Appeals twice, and is now before the Supreme Court for the second time. He has had his days in Court and nothing exists in the contentions raised by him that should challenge the discretion of the Supreme Court.

We are confronted with the unusual situation where the defendant appellant claims failure or proof of a material fact alleged in the Amended Complaint (Par. 9 App 7 a #17966) which he did not deny, but, in fact, in his Answer, conceded, by admitting the existence of the scheme and the insolvency of the bankrupt from the beginning, and by alleging that there were proofs of claim on file in the bankruptcy representing claims of creditors other than participants in the scheme (See Par. 2 Second Defense and Third Defense App. 11a #17966).

We have the further anomaly in these proceedings where the defendant appellant questions the probative value of plaintiff appellee's proof when he neither tested it by cross examination or sought to rebut it by testimony of his own.

It is submitted that for the reasons stated herein, this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

J. VINCENT AUG
1005 Atlas Bank Building
Cincinnati, Ohio 45202

S. ARTHUR SPIEGEL
301 Atlas Bank Building
Cincinnati, Ohio 45202
Attorneys for Plaintiff-Appellee

Of Counsel

WILLIAM H. NIEMAN
1005 Atlas Bank Building
Cincinnati, Ohio 45202